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No. 83-469

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a prosecutor may rebut closing defense argument impugning the integrity of the prosecution and asserting that the prosecutors themselves do not believe in the defendant's guilt by responsive argument that would be inappropriate in the absence of such provocation.

2. Whether the court of appeals erred in reversing on the basis of the prosecutor's remarks when respondent did not object to the remarks at trial.

3. Whether, assuming the prosecutor's remarks were improper, the court of appeals erred in failing to determine whether they constituted harmless error.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. A petition for rehearing was denied on June 20, 1983 (Pet. App. 12a). Justice White extended the time within which to file a petition for a writ of certiorari to and including September 18, 1983 (a Sunday). The petition was filed on September 19, 1983, and was granted on February 21, 1984 (J.A. 12). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, respondent was convicted on nine counts of mail fraud, in

violation of 18 U.S.C. 1341, and three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001.[1] He was sentenced to two years' imprisonment on each count, to be served concurrently, and was fined $39,000. The court of appeals reversed (Pet. App. 1a-11a).

1. The evidence at trial showed that respondent, vice president and general manager of Compton Petroleum Corporation (Compton) in Abilene, Texas, contracted in 1976 and 1977 to deliver monthly supplies of Oklahoma "sweet" crude oil[2] to the Apco Oil Corporation (Apco) refinery at Cyril, Oklahoma. Some 205,000 barrels of oil were delivered between January and September 1977, but approximately 117,250 barrels consisted of fuel oil, an already refined product different from and less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all the oil was crude oil. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with government regulations, the amount of crude oil it thought it was refining each month. The FEA in turn relied on Apco's reports to determine the national averages of tier categories of refined oil

[1] Prior to trial, the government dismissed one other mail fraud count, and at the close of the evidence, the district court granted a judgment of acquittal on a second mail fraud count. The jury acquitted respondent on one count of interstate transportation of stolen property (18 U.S.C. 2314). Compton Petroleum Corporation was also indicted with respondent. Prior to trial, the district court accepted the corporation's nolo contendere plea to the indictment and imposed a fine (Pet. App. 3a).

[2] Crude oil is a liquid hydrocarbon in its natural state. "Sweet" crude oil has a low sulfur content.

for purposes of equalizing the cost of crude oil under its entitlements program. Pet. App. 2a.

In December 1976, respondent agreed with Hugh Bradley, Apco's vice president of supply and transportation, to increase the amount of crude oil that Compton was delivering to Apco's Cyril refinery. Shortly afterward, respondent and Bradley signed a contract formalizing that agreement; they later amended the agreement to make it automatically renewable each month. Tr. 351-354, 510-512; GX 47, 48.

Although respondent caused certain amounts of crude oil to be delivered to Apco in compliance with the contract, he used other means of supply for the remainder of the oil deliveries. In the same period that respondent spoke with Bradley, respondent suggested an arrangement with Kenneth Ross, a longtime friend and business associate (Tr. 339-340).[3] Ross owned Prime Resources Corporation, an oil brokerage firm (Tr. 318-320). Under respondent's plan, Ross was to secure fuel oil and falsely certify that it was crude oil; in turn, respondent would have Compton pay Ross a 10¢ per barrel commission as a fee for the recertification (Tr. 261, 320-323). Ross fulfilled his agreement; he began to buy fuel oil from Producer's Crude, Inc., an Abilene, Texas oil reseller. The invoices from Producer's Crude to Prime Resources accurately stated that the purchases were of fuel oil (GX 24-26, 28), but Prime Resources' invoices to Compton for the same substance certified that they

[3] Ross testified to the transactions at trial, having pleaded guilty to a charge of conspiracy in connection with his role in the scheme (Tr. 325-326).

were of crude oil (GX 8). See Tr. 180, 253-258, 272, 306-311, 320-322, 421-423.[4]

The fuel oil was delivered from the refinery to two holding tanks in Compton's yard in Abilene (Tr. 49-50, 84-90, 97-98, 125-126, 137-138, 156). To make it appear that the tanks contained crude oil, Compton's truck dispatcher painted a crude oil lease number on the tanks (Tr. 100-101, 110, 140-141). Several Compton truck drivers then reloaded the fuel oil into Compton trucks and delivered it to the Apco refinery in Cyril (Tr. 96, 107-111, 120-121, 124, 135-137, 153-155, 160, 165-166; GX 6D-6I). Though Compton's drivers normally performed two simple tests on crude oil obtained from a lease site, they were told that it was not necessary to perform any tests on the oil taken from the tanks in Compton's yard (Tr. 52-53, 105-106, 129, 144, 155-156).[5]

At Apco's Cyril refinery, the Compton drivers emptied their fuel oil into a lease automatic custody transfer (LACT) unit. The LACT unit, which

[4] Producer's Crude bought the fuel oil from another Abilene concern, Pride Refinery (Tr. 49, 421-423; GX 34, 35, 40). Respondent's nephew, Mike Rawlings, who worked for Producer's Crude (Tr. 48, 85), transported the fuel oil from the refinery to Compton's yard in Abilene, approximately seven miles away. Rawlings made between two and six deliveries per day, hauling 20,000-25,000 barrels of fuel oil each month from March through September 1977 (Tr. 84-90). Before Rawlings' tenure, some loads of fuel oil were moved by Compton drivers directly from the Pride refinery to Apco at Cyril (Tr. 131, 163-164, 166-167).

[5] Those tests are known in the trade as "shakeouts." A small quantity of crude oil is placed in a device which measures its relative weight in degrees. This is referred to as the "gravity" of the oil. In addition, the crude oil's basic sediment and water (BS&W) content is measured (Tr. 52-53, 105, 129).

was not manned, automatically measured the number of barrels in each delivery. It also collected a small sample of each barrel for later testing. Such testing would reveal, inter alia, the relative weight—known as "gravity"—of the oil. Tr. 47-48, 375-377. A high gravity crude oil, in the 35° to 40° gravity range, yields greater quantities of gasoline and diesel fuel after refining than does a lower gravity crude oil, which yields more fuel oil and asphalt (Tr. 400-406, 414).[6] Apco wanted a high gravity crude for gasoline production (Tr. 357, 400-403).

Because fuel oil has a low gravity, respondent made arrangements to conceal what he was supplying. He had Compton's crude oil trader purchase from two other companies quantities of condensate, a high gravity liquid taken from the wellheads of natural gas wells. The condensate was delivered to a Compton storage station at Chickasha, Oklahoma. Tr. 51, 53-54, 64-66, 80, 179, 479; GX 1A-1B, 2A-2J. Compton drivers later moved the condensate to the LACT unit at Apco's Cyril refinery (Tr. 123-125, 130, 155). Since the condensate's gravity was 60° or higher, blending it with the fuel oil resulted in an increase in the gravity measurement of the oil stream (Tr. 52, 56, 76).

Respondent's scheme was common knowledge among the Compton truck drivers who delivered fuel oil to Apco (Tr. 121, 157-158). Other Compton employees were not as knowledgeable. When Kenneth Fuller, Compton's operations manager and respondent's second in command, discovered that fuel oil was being delivered to Apco, he confronted respondent, who replied that there "wasn't any problem" with

[6] Fuel oil comes from the "bottom of the barrel" and is not a profitable product for a refinery (Tr. 422, 424).

such deliveries (Tr. 72-73, 75-77). And in April 1977, Homer Reves, Compton's chief accountant, told another employee that something was not right about the Apco transaction, because Compton was buying oil from Prime Resources yet was paying a second company for most of the oil (Tr. 201-202). On one occasion, L. K. Bird, another Compton accountant, received an invoice. Bird showed the invoice to Reves, who said that fuel oil was being delivered to Apco contrary to the terms of Compton's contract with Apco. Reves also said that he believed that Prime Resources was being paid a fee for changing the certification concerning the oil. Tr. 251, 261-262. Reves returned the fuel oil invoice to Prime, and he later received in its place an invoice for crude oil (Tr. 268-269).[7] In addition, Judy Boeshart, a Compton production supervisor, heard respondent tell another Compton employee that fuel oil would be invoiced through Ken Ross, who would change the certifications to reflect crude oil instead. Ross's fee for this service was to be 10¢ per barrel. Tr. 273-274.

Despite the growing numbers of persons at Compton who were aware of respondent's scheme, Apco was slow to discover it. Not until September 1977, as the result of an investigation prompted by another company's delivery of fuel oil, did Apco determine that respondent also was furnishing fuel oil. Later in September, a sample was taken from the LACT unit used by Compton, and an Apco laboratory technician

[7] After the instant investigation began, Kenneth Ross and his wife Jerit, who had prepared the invoices containing false certifications that crude oil was sold, substituted in Prime Resources' file new invoices that correctly stated that fuel oil had been sold (Tr. 306-307, 320-322).

performed a distillation test on that sample.[8] The technician's conclusion was that the oil provided by respondent was 50% residual fuel oil. Tr. 354-356, 368-369, 378-379, 403-405; GX 36A, 36B. On learning of the test results, Don Heavin, Apco's pipeline superintendent and a friend of respondent, called respondent and asked whether he was delivering virgin crude oil. Respondent said that he was (Tr. 379, 496, 516).[9] Heavin reported the test results to Hugh Bradley, and afterwards the Compton deliveries decreased (Tr. 354-355, 370, 378-381).[10] Because of respondent's delivery of a fuel oil/condensate mixture, Apco needlessly spent time and money duplicating the refinement of already refined fuel oil (Tr. 372). In addition, the refining process produced too much fuel oil for Apco's needs and an insufficient amount of gasoline (Tr. 357, 378, 403). An Apco chemist testified that condensate had little value in the refining process and that very little of it is usable at all (Tr. 416-417).

[8] A distillation test is more complicated than the simple gravity and BS&W tests that normally were performed (Tr. 368, 376).

[9] Earlier, when the other company's fuel oil delivery was discovered, Hugh Bradley of Apco called respondent and asked if respondent likewise was delivering fuel oil. Respondent assured Bradley that he knew nothing about deliveries of fuel oil (Tr. 357-358).

[10] In March 1979, two FBI agents interviewed respondent as part of an investigation into allegations that various companies had sold fuel oil to Apco in 1977 and had falsely certified that it was crude oil (Tr. 293). Respondent told the agents that Compton had sold oil to Apco in 1977, but he maintained that Compton sold virgin crude oil, not fuel oil certified as crude. Respondent also told the agents that if he had discovered that Compton was selling fuel oil, he would immediately have terminated the deal. Tr. 294.

Throughout this period, Apco filed monthly reports with the Federal Energy Administration concerning the amounts of crude oil that Apco thought it was refining (Tr. 431, 434-435; GX 49). Using those reports and similar ones filed by other crude oil refiners, the FEA determined the average monthly price of crude oil per category. Those refiners who had access to cheaper oil had to purchase entitlements, *i.e.*, pay into a fund, while those who paid more than the national average received rebates from this fund. The purpose of the entitlements program was to equalize the cost of crude oil among all refiners nationwide (Tr. 371, 432-433). Refiners were not supposed to report fuel oil that they received, and they were not entitled to any compensation for purchases of fuel oil (Tr. 433-434, 439-440). The Apco official in charge of regulatory compliance testified that the company would have to return the entitlements payments it received in connection with the fuel oil deliveries (Tr. 440).

2. In his own defense, respondent admitted that he had knowingly purchased fuel oil from Prime Resources, but he claimed that he thought that such fuel oil could legitimately be certified as crude oil (Tr. 476-477, 526-527). He based that contention on his knowledge that crude oil had been sold in the past as fuel oil, from which he concluded that the reverse could be true (Tr. 477). In addition, he said that he believed that if condensate were blended with fuel oil, the result would be the equivalent of a barrel of crude oil (Tr. 478, 520-521).[11] Because he had received no

[11] To the FBI agents, however, respondent had acknowledged that crude oil was more valuable than fuel oil, which is a less valuable component of the refinement process (Tr. 294). Moreover, respondent admitted at trial that he had not wanted to tell Heavin that the product he was providing to Apco was fuel oil rather than virgin crude, because Heavin "was a friend of mine and that would have been kind of hard to explain to him what it was" (Tr. 496).

complaint from Apco prior to September 1977, he said that he believed that Apco was pleased with the stream of oil he was supplying (Tr. 495). Respondent admitted that he had lied to Heavin, Bradley, and the FBI agents by saying that he had not sold fuel oil to Apco (Tr. 487, 496-497, 516), but he maintained that the composite stream of oil he had provided to Apco was actually better than what Apco otherwise was receiving (Tr. 494).

3. In closing argument, the prosecutor summarized the evidence against respondent. Respondent's attorney began his own summation by arguing that the case against respondent had been presented unfairly by the prosecution, and that "[f]rom the very beginning" to "this very moment," the government had attempted to "poison your [the jurors'] minds unfairly" (J.A. 4). He went on to charge the prosecution with "reprehensible" conduct in purportedly attempting to cast a false light on respondent's actions (J.A. 5). Defense counsel also pointed to the prosecution table and said, "I submit to you that there's not a person in this courtroom including those sitting at this table who think that [respondent] intended to defraud Apco" (J.A. 5). Finally, near the conclusion of his argument, respondent's attorney said that respondent had been the only person in the case who had acted "with honor and with integrity" and that "[t]hese complex economic regulations should not have any place in an effort to put someone away" (J.A. 7).

In rebuttal, the prosecutor responded to defense counsel's claim that the government did not believe in its own case by saying (J.A. 8-9): [12]

> I think [defense counsel] said that not anyone sitting at this table thinks that [respondent] intended to defraud Apco. Well, I was sitting here and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.

After reviewing some of the evidence against respondent, the prosecutor then said, "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember the testimony, you remember what they said and what he admitted they said. I think it's a fraud" (J.A. 9).

Government counsel also responded to defense counsel's claim that Apco had not suffered any loss in the FEA's entitlement program; the prosecutor said that, based on his experience in these matters, Apco would have to make some kind of restitution (J.A. 10). Finally, the prosecutor addressed defense counsel's claim that respondent had acted with honor and integrity and that the jury should not convict on the basis of complex energy certification regulations. The prosecutor briefly reviewed some of respondent's conduct, and suggested that such conduct did not constitute honor and integrity and that the jury would not be doing its duty by ignoring the court's instructions and acquitting on such a concept (J.A. 10-11).

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[12] The prosecutor first answered defense counsel's charge that the prosecution had failed to inform the jury that Compton was selling crude oil to other locations (J.A. 8). Respondent apparently does not object to that response.

Respondent did not object to any of these statements.

4. Despite respondent's failure to object at trial, the court of appeals held that the prosecutor's statements constituted misconduct and warranted reversal (Pet. App. 10a). The court rejected the government's argument, based on the Court's decision in *Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958), that the prosecutor's statements were invited by defense counsel's own arguments. The court said instead that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (Pet. App. 11a). Judge McWilliams dissented without opinion (*ibid.*).

The court also denied the government's petition for rehearing by the same vote (Pet. App. 12a-13a). In that petition, the government argued that the court of appeals panel had erred in not considering whether the prosecutor's statements were harmless in light of the record as a whole, particularly since there was overwhelming proof of respondent's guilt. In connection with that argument, the government called the court of appeals' attention to this Court's then-pending consideration of a similar issue in *United States* v. *Hasting*, No. 81-1463 (May 23, 1983). In addition, the government argued that the court of appeals had erred in finding the prosecutor's arguments to be "plain error" when defense counsel's failure to object had deprived the district court of an opportunity to remedy any purported error. Finally, the petition noted that the decision below appeared to be inconsistent with this Court's decision in *Lawn* and with decisions by other courts of appeals on the "invited response" doctrine. The court denied rehearing without opinion (Pet. App. 12a-13a).

SUMMARY OF ARGUMENT

Respondent's convictions for mail fraud and making false statements to a government agency were reversed by a divided panel of the court of appeals on a finding that certain comments made by the prosecutor during rebuttal argument, though not objected to at trial, were plain error. The comments were in direct response to improper remarks by defense counsel placing the good faith of the prosecution in issue. The court held that the prosecution has no right of reply to improper defense remarks. The court made no finding that the remarks affected respondent's substantial rights or otherwise prejudiced him, and it did not address the government's argument that the comments, if error at all, were harmless.

The court of appeals thus committed three separate but interrelated errors, with significant implications for the administration of criminal justice in the federal courts. First, the court refused to view the challenged comments of the prosecutor in light of the defense comments that provoked them. Second, the court disregarded the contemporaneous objection rule, finding "plain error" solely on the basis that the court's prior precedents had spoken clearly to the issue, without analysis of prejudice, if any, to respondent's substantial rights. Third, the court reversed the conviction without considering whether the error was harmless.

The court's holding that the prosecution has no right to respond to improper defense statements in summation is contrary to precedent and overlooks the adversarial dynamics of trial. If the defense raises an issue, such as the prosecutor's personal sincerity or integrity, it is only fair that the prosecution be able to rebut it. The court of appeals' approach would permit the defendant to goad the prosecutor

into a response, and then benefit by procuring a reversal.

The court's approach would also result in application of the rule against "vouching" in a context where it does not apply. The usual dangers that can make a prosecutor's statements of personal belief prejudicial to the accused were almost surely absent here. A prosecutor's statements of personal belief ordinarily imply knowledge of evidence outside the record and may give the impression that the prestige of the government is brought to bear against the accused. Where the statements are in direct response to defense counsel's accusations concerning the prosecutor's personal beliefs, however, the jury will ordinarily understand the prosecutor's response as just that—a response—and will not accord the remarks undue significance or weight. The import of comments made in closing arguments must be evaluated in context, as the jury heard them, and not on the abstract basis of a per se rule.

The court of appeals aggravated its one-sided approach to evaluating closing argument by its disregard for the contemporaneous objection rule and its failure to consider harmless error. Each of these principles can be understood as a protection of the integrity of the trial process. Each guards against a hypersensitive scrutiny of trial practice by appellate courts. Broad discretion is rightly vested in district courts to ensure fairness and maintain decorum; and concomitant reliance is placed on trial counsel to identify errors when made so that they can be rectified. No doubt appellate counsel and appellate judges can often spot deficiencies that went unnoticed at trial. The limiting principles of appellate review, however, are predicated on the understanding that

deficiencies not noticed at the time are unlikely to have caused serious prejudice to the defendant and that the costs to the system of applying keen hindsight to a criminal trial are, except in egregious circumstances, too high.

Here, neither the trial court nor defense counsel saw anything amiss in the prosecutor's rebuttal. This can doubtless be attributed to the fact that they had also heard the provocation. Yet, on the basis of a per se rule, without any finding of actual prejudice to respondent, the court of appeals reversed the conviction. The court then failed to consider the harmlessness of the error—thus underscoring its indifference to actual prejudice. The result of the decision is to require retrial of a defendant whose guilt is indisputable on the record, on the basis of a putative error that carried with it little potential for prejudicing respondent's right to a fair trial and an accurate verdict.

The decision below thus stands in direct conflict with decisions of this Court concerning a prosecutor's right to reply to improper arguments by the defense (*Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958)), the defendant's obligation to object to improper remarks by the prosecutor at trial (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)), and the appellate court's duty to consider whether any trial error is harmless (*United States* v. *Hasting*, No. 81-1463 (May 23, 1983)). It should be reversed.

ARGUMENT

I. A PROSECUTOR'S COMMENTS IN REBUTTAL ARGUMENT ARE NOT IMPROPER IF THEY WERE INVITED BY IMPROPER COMMENTS MADE BY DEFENSE COUNSEL

In the adversary process of a criminal trial, the government has a special obligation to "refrain from improper methods calculated to produce a wrongful conviction." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). The attorney for the government "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Ibid.* Nor are foul blows and improper methods within the legitimate arsenal of the defense. At issue in this case is the propriety of corrective steps taken by the government when defense counsel has overstepped the bounds of proper argument.

The prosecutor in rebuttal argument at trial stated his personal belief that respondent was guilty of fraud. Such a statement, examined in isolation, would be prosecutorial error. For weighty reasons discussed below (see pages 24-25, *infra*), such statements, if prejudicial and if preserved for appellate review by timely objection, can necessitate reversal of a conviction. But—contrary to the decision below—such statements must not be viewed in isolation. Where the defense itself has raised the issue of the prosecutor's personal beliefs regarding the case, the prosecutor's response, if proportionate to the provocation, is permissible. The court of appeals' per se rule against prosecutorial response to improper defense argument disregards the realities of trial and conflicts with numerous decisions of this and other courts.

A. Recognition Of A Prosecutor's Right To Respond To Provoking Comments By Defense Counsel Is Consistent With Trial Fairness And Well Established Precedent

Closing arguments "are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-647 (1974). A closing argument requires quick thinking—and often quick response to comments by opposing counsel. Perhaps because of the difficulties experienced in closing arguments, it has long been recognized that a prosecutor has the right to comment on and respond to an opposing counsel's argument, and in a vigorous manner, not one "confined to such detached exposition as would be appropriate in a lecture." *United States* v. *Wexler*, 79 F.2d 526, 530 (2d Cir. 1935), cert. denied, 297 U.S. 703 (1936); *Malone* v. *United States*, 94 F.2d 281, 288 (7th Cir.), cert. denied, 304 U.S. 562 (1938). In *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958), this Court held that the prosecution may respond in rebuttal to improper arguments by defense counsel, even though such response might not be permissible in the absence of provocation. In *Lawn*, as in the instant case, a defense attorney attacked the government's good faith in bringing the prosecution, and also accused two key government witnesses of being perjurers. This Court held that defense counsel's argument "clearly invited the [prosecutor's] reply," in which he vouched for the credibility of the challenged witnesses (*ibid.*).[13]

[13] Earlier, in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940), the Court had also recognized that a prosecutor could legitimately state his belief in the defendant's guilt as a rebuttal to defense arguments that placed the government's views in issue. In that case, the Court found that the particular comments "overstep[ped] the bounds" of such a reply, but it nonetheless found that the prosecutor's comments did not warrant reversal (*ibid.*).

Most courts of appeals have followed the *Lawn* doctrine of "invited response" and have refused to reverse convictions where prosecutors responded in closing argument to attacks made by defense counsel.[14] The court below, however, refused to apply the holding of *Lawn*, despite explicitly recognizing that the prior accusations by defense counsel constituted "improper conduct" (Pet. App. 11a). Instead, it followed an independent line of Tenth Circuit authority, developed without reference to *Lawn*, that holds that "even if improper argument is made by defense coun-

[14] *E.g.*, *United States* v. *Maccini*, 721 F.2d 840, 846-847 (1st Cir. 1983); *United States* v. *Harrison*, 716 F.2d 1050, 1053 (4th Cir. 1983), cert. denied, No. 83-1326 (May 14, 1984); *United States* v. *Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983); *United States* v. *West*, 670 F.2d 675, 688-689 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981); *United States* v. *Schwartz*, 655 F.2d 140, 142 (8th Cir. 1981); *United States* v. *Praetorius*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Kim*, 595 F.2d 755, 767-768 (D.C. Cir. 1979); *United States* v. *Isaacs*, 493 F.2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States* v. *Sullivan*, 421 F.2d 676, 677 (5th Cir. 1970) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966). See also 1 ABA Standards for Criminal Justice ¶ 3-5.8, commentary at 3-91 (2d ed. 1980) ("[A] prosecutor may be justified in making a reply to an argument of defense counsel that may not have been proper if made without provocation."). But see *United States* v. *Robinson*, 716 F.2d 1095 (6th Cir. 1983), petition for cert. pending, No. 83-613.

sel, the door is not thereby opened to similar conduct by the prosecution." See *United States* v. *Rios*, 611 F.2d 1335, 1343 (1979); *United States* v. *Latimer*, 511 F.2d 498, 503 (1975); *United States* v. *Ludwig*, 508 F.2d 140, 143 (1974).[15] Moreover, the court of appeals emphasized that the Tenth Circuit's rule operates per se; the court will examine only the conduct of the prosecutor, without reference to any statements by the defense that might have prompted it. The court stated that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (Pet. App. 11a). The Tenth Circuit's per se rule, applied by the court below, is in direct conflict with the "invited response" doctrine of *Lawn* and its progeny.

The comments by the prosecutor that are now complained of by respondent were unquestionably pro-

[15] The Tenth Circuit's current position evolved indirectly, through dictum, without citation to *Lawn* or to decisions of any other circuit. The rule was first announced in *Ludwig* (508 F.2d at 143). However, the government in *Ludwig* did not argue that the prosecutor's comments at issue were a permissible response to defense comments, but conceded they were in error. The government's argument—rejected by the court—was that the error was harmless "in view of numerous complaints directed against defense counsel's own conduct" (*ibid.*). In *Latimer*, the court faced the issue of improper response to a *proper* argument by the defense (see 511 F.2d at 503), quoting the *Ludwig* rule in dictum. Finally, in *Rios*, the court concluded that the record did not support the government's claim that the prosecutor's comment was in response to the defense (611 F.2d at 1343). Thus, the court's statement of the general rule against a prosecutor's right to reply (*ibid.*) was again dictum. The instant case is apparently the first in which the rule has been employed in clear contravention of *Lawn*.

voked by defense counsel, who attacked the integrity of the prosecution and gratuitously raised the issue of the prosecutor's personal beliefs. In his summation, respondent's attorney argued that the government had presented the case unfairly and that "[f]rom the very beginning" to "this very moment," the government had attempted to "poison your [the jury's] minds unfairly" (J.A. 4). He also charged the prosecution with "reprehensible" conduct in purportedly attempting to cast respondent's activities in a false light (J.A. 5). He then pointed to the prosecution table and claimed that "there's not a person in this courtroom, including those sitting at this table [the prosecutors and the case agent] who think that Billy Young intended to defraud Apco" (*ibid.*). Having placed the prosecutors' good faith in issue, respondent thus opened the door for the prosecutor's direct response (J.A. 8-9):

> I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
>
> * * * * *
>
> I don't know what you call that, I call it fraud.
>
> You can look at the evidence and you can remember * * * what they said and what he admitted they said. I think it's a fraud.

The provocation here was quite similar to that involved in *Lawn*, where defense counsel stated "that the United States Attorney and his assistant in

charge of the case 'had been instructed, or in my opinion they never would have done this'" (355 U.S. at 359-360 n.15). Accordingly, under these circumstances, "the prosecutor was certainly entitled to reply with rebutting language suitable to the occasion" (*United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973)), including "statements * * * which otherwise would be improper" (*United States* v. *Doyle*, 234 F.2d 788, 796 (7th Cir.), cert. denied, 352 U.S. 893 (1956), quoting *Malone*, 94 F.2d at 288).

In similar circumstances, other courts have held that a defendant should not profit from his own attorney's inducement of retaliatory arguments by a prosecutor. For example, in *Del Cristo* v. *United States*, 327 F.2d 208 (5th Cir. 1964), defense counsel argued that the prosecutor did not really believe that the defendant was guilty but had chosen to prosecute the defendant because two more culpable individuals had mistakenly been released. The court of appeals held that that argument "provoked" the following retort from the prosecutor (*id.* at 209):

> I want you to realize the fact that if this man is guilty and you let him go, he will go out and sell [narcotics] again and again. * * *
>
> My final word, ladies and gentlemen, is my sincere belief—and again I must say that defendant's counsel led you to believe that I don't believe this story, that I am here because I have a job to do—but I believe this man is guilty of the crime charged, or I would not be standing here right now prosecuting him. We do have a dirty duty as prosecutors. * * *

To the same effect is *United States* v. *West*, 670 F.2d 675, 689 (7th Cir.), cert. denied, 457 U.S. 1124 (1982), where defense counsel placed at issue the

integrity of the United States Attorney's Office, and the prosecutor responded, "I will stand up for everyone in the government, that's who I represent," and urged the jury to quickly return a not guilty verdict if it did not approve of the way the government had investigated and brought the prosecution. The court of appeals found nothing improper in this argument, for defense counsel had raised the issue, thus inviting the government's response, which the court held to be "within the bounds of proper argument" (*ibid.*). Accord, *United States* v. *Praetorius*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980) (defense counsel's "vitriolic" attacks on the integrity of the prosecution team and government's witnesses justified prosecutor's responses); *United States* v. *Hoffa*, 349 F.2d 20, 51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966) (proper for prosecutor to state his belief in defendant's guilt where prosecutor's integrity had been questioned); *United States* v. *Battiato*, 204 F.2d 717, 719 (7th Cir.), cert. denied, 346 U.S. 871 (1953) (prosecutor's statement of belief in defendant's guilt justified by defense counsel's quotation of motto from the Department of Justice building that the "Government wins when justice is done"); see also *United States* v. *Harrison*, 716 F.2d 1050, 1052-1053 (4th Cir. 1983), cert. denied, No. 83-1326 (May 14, 1984) (prosecutor's expression of hatred for defendants provoked by defense counsel's summation).

We do not suggest, of course, that *any* improper argument by the defense automatically opens the door to *any* retort by the government. The propriety of the prosecution's response must be examined in light of: (1) the logical relation between the challenged arguments and the defense statements that

provoked them;[16] and (2) the appropriateness of the response in light of the nature of the defense statements.[17] The measure of the response is the provocation.

Here, the prosecutor's affirmation of his "personal impression[]" that respondent intended to commit a fraud (J.A. 8-9) was related to defense counsel's baseless accusation that "there's not a person in this courtroom"—specifically gesturing at the prosecutors —"who think that Billy Young intended to defraud Apco" (J.A. 5). Indeed, the prosecutor introduced his statement by summarizing defense counsel's charge ("I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco" (J.A. 8)) and informed the jury that the reason he was giving his "personal impressions" was

[16] For example, in *United States* v. *West*, 680 F.2d 652, 655-656 (9th Cir. 1982), the court recognized the "invited response" doctrine but found that the government's comments were not logically connected to the defense comments that supposedly invited them. By contrast, in *LaSorsa*, 480 F.2d at 526, the court found that "[t]he defense had, indeed, insinuated precisely the type of prosecutorial misconduct which the prosecutor was attempting to refute in his argument to the jury."

[17] For example, in *Socony-Vacuum*, 310 U.S. at 242, this Court determined that the "subject matter" of the prosecutor's remarks was "certainly relevant" to the defendants' argument to the jury, but found that the remarks nonetheless "overstep[ped] the bounds." Courts have recognized that "even egregious remarks will not necessarily require reversal of a conviction" where the prosecutor's remarks "were invited by the equally egregious conduct of * * * defense counsel" (*United States* v. *Harrison*, 716 F.2d at 1051), yet the persistence and emphasis of the prosecutor's statements are significant factors in determining whether there was reversible error. *Ibid.*; see also *United States* v. *Elmore*, 423 F.2d 775, 781 (4th Cir.), cert. denied, 400 U.S. 825 (1970).

that "it was asked of me" (J.A. 9). Nor were the prosecutor's remarks disproportionate to the provocation. In light of defense counsel's repeated attacks on the integrity of the prosecution, the relatively mild corrective statements by the prosecutor were clearly "rebutting language suitable to the occasion." *United States* v. *LaSorsa*, 480 F.2d at 526.[18] As the Second Circuit observed in somewhat similar circumstances, "in light of the fact that the defense lawyers attacked the credibility and honesty of the Government's case in their closings, the Government's statements * * * were understandable if not laudable." *United States* v. *Perry*, 643 F.2d 38, 51 (2d Cir.), cert. denied, 454 U.S. 835 (1981).

The other comments faulted by the court of appeals stand on the same footing. The prosecutor's comment that respondent had not acted with "honor and integrity" and his reminder to the jury that they had a duty to follow the court's instructions (J.A. 10-11) were in response to defense counsel's argument that respondent had been "the only one in this whole affair that has acted with honor and with integrity" and that "[t]hese complex economic regulations should not have any place in an effort to put someone away" (J.A. 7). Cf. *United States* v. *West*, 670 F.2d at 689; *United States* v. *Isaacs*, 493 F.2d 1124, 1165 (7th Cir.), cert. denied, 417 U.S. 976

[18] We do not believe that the alternative proposed by the court of appeals (Pet. App. 11a)—objecting to an improper defense argument and requesting an instruction to the jury to disregard that argument—is sufficient to dispel the unfairness engendered by an argument like respondent's here. Such an instruction would not answer the factual assertion of prosecutorial hypocrisy that was made here. It is not surprising that the court and attorneys involved apparently viewed a direct answer by the prosecutor as the appropriate response.

(1974); *United States* v. *LaSorsa*, 480 F.2d at 526. And the prosecutor's statement that, according to his experience, Apco might well have to make restitution under the entitlements program was supported by direct testimony by an Apco official to that effect (see Tr. 440).

In short, the court below was clearly in error in refusing to analyze the propriety of the prosecutor's rebuttal argument in light of the context in which it arose—the provocations of defense counsel's summation. *United States* v. *Maccini*, 721 F.2d 840, 846-847 (1st Cir. 1983); *United States* v. *West*, 670 F.2d at 688-689; *United States* v. *Isaacs*, 493 F.2d at 1165.

B. The Court of Appeals' Per Se Rule Exceeds The Protections Necessary To Avoid Prejudicial "Vouching" By The Prosecution

Expression of personal opinion by the prosecutor concerning the guilt of the accused or the credibility of witnesses—commonly called "vouching"—is widely recognized as improper, and can in some circumstances so prejudice the rights of the defendant as to necessitate reversal of a conviction. See, *e.g.*, *Berger*, 295 U.S. at 88; *Mason* v. *United States*, 719 F.2d 1485, 1489 (10th Cir. 1983); *United States* v. *Roberts*, 618 F.2d 530, 533-534 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981); 1 ABA Standards for Criminal Justice ¶ 3-5.8, commentary at 3-87 (2d ed. 1980).

There are two principal ways in which vouching can prejudice a defendant. First, and most serious, a prosecutor's comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant. See *Lawn*, 355 U.S. at 359-360 n.15; *Roberts*, 618 F.2d at 533; *United States* v. *Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972); ABA Standards, *supra*, commentary at 3-89 ("Expressions of personal opinion by the prosecutor are a form of unsworn, unchecked testimony."). They can thus jeopardize the defendant's right to confront his accusers and to be tried solely on the basis of evidence properly placed before the jury. Second, the prosecutor's opinion may "place the prestige of the government" (*Roberts*, 618 F.2d at 533) behind a witness or a conclusion, thus tending "to exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued" (ABA Standards, *supra*, commentary at 3-88). It may induce the jury to trust the government's judgment rather than its own view of the evidence.

The court of appeals' disregard for the context of the prosecutor's remark in the trial below—its genesis in the prior improper statements of defense counsel—resulted in reversal of conviction where neither of these concerns was implicated.

The prosecutor's statement of his "personal impression[]" that respondent intended to commit a fraud contained no suggestion whatsoever that it had a basis outside the evidence at trial. The prosecutor specifically supported his opinion by reference to the evidence—that respondent received "85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of" (J.A. 8-9). He then reiterated to the jury, "You can look at the evidence and you can remember * * * what they said and what he admitted they said. I think it's a fraud" (J.A. 9). Perhaps most to the point, the jury, having heard the comments in context, must surely have understood them for what they were: a defense of the prosecutor's own integrity in bringing charges on the basis of the evidence that the jury had heard. There is no reason to suppose that the jurors would accord the remarks the more sinister construction that the prosecutor was communicating information outside the record.

Nor did the prosecutor seek to exploit the prestige of the government to sway the jurors. Quite the opposite: he was attempting to restore the jury's faith in the fairness of the prosecution, which had been groundlessly impugned by defense counsel's effort to sway the jury against the government. The correction of the false impression created by defense counsel did not induce the jury to disregard the evidence, but instead properly tended to refocus its attention on the evidence instead of on the irrelevant and unsupported accusations by defense counsel.

In circumstances such as these, the invited response doctrine is an appropriate complement to the rule against prosecutorial vouching. By requiring the appellate court to examine the challenged prosecutorial statements in light of defense provocation, the doctrine obviates reversals of convictions where the underlying rationale of the rule against vouching does not apply.

Moreover, the invited response doctrine inhibits abuse by defense counsel of the limits on proper closing argument. To focus on the prosecutor's argument in isolation is to grant a windfall to defendants who invite error, thus encouraging misconduct by defense counsel. Defense attorneys should not be free to goad their opponent into making a response, and then obtain appellate reversal of their client's conviction by insisting that the prosecutor's comment be viewed outside the context in which it arose.

II. BECAUSE RESPONDENT FAILED TO LODGE A TIMELY OBJECTION AT TRIAL TO THE PROSECUTOR'S ARGUMENT, THE COURT OF APPEALS SHOULD NOT HAVE CONSIDERED THE ISSUE ON APPEAL

Even assuming arguendo that the court of appeals correctly condemned the prosecutor's rebuttal argument, the court was still wrong in finding that his

comments, which were not objected to at trial, were proper grounds for reversal on appeal. This Court has held that "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the [prosecutor's] comments to the jury were improper and prejudicial." *Socony-Vacuum*, 310 U.S. at 238-239; see *Crumpton* v. *United States*, 138 U.S. 361, 364 (1891). This contemporaneous objection rule requires a defendant to state an objection clearly at trial in order to preserve that objection on appeal. The rule applies to objections to, inter alia, admission of evidence, jury instructions, and statements in closing argument. See *United States* v. *Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966).

While there does exist a "plain error" exception to the contemporaneous objection rule—reflected in Fed. R. Crim. P. 52(b)[19]—it must be "used sparingly" (*United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982)), lest it swallow up the requirement of timely objections at trial. Accordingly, this Court has held that where, as here, a defendant has failed to object to the prosecutor's statements to the jury when they were made, an appellate court may not reverse on the basis of an erroneous statement contained in that argument unless the impropriety is "obvious" or would "otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *Socony-Vacuum*, 310 U.S. at 239, quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). In *Frady*, 456 U.S. at 163 & n.13, this Court stated that

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[19] Fed. R. Crim. P. 52(b) provides:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

the plain error exception is confined to "egregious errors," and is to be used "solely in those circumstances in which a miscarriage of justice would otherwise result." This exacting definition of plain error has generally been observed by the courts of appeals. *Id.* at 163 n.14.[20]

The contemporaneous objection rule serves obvious and salutary purposes. Timely objection affords both the trial court and the prosecutor the opportunity to consider, and perhaps rectify, their decisions and trial tactics while it is still possible to do so. If a defendant prevails on his objections, he may avert prejudicial error and thus enhance his chances to secure an acquittal from the jury. And if he nonetheless is convicted, his timely objections will have defined and delimited the points to be reviewed on appeal, and will have obviated the need to reverse a conviction simply because an error that was susceptible of correction was not perceived at trial. See *United States* v. *Somers*, 496 F.2d 723, 742 (3d Cir.), cert. denied, 419 U.S. 832 (1974). Even if the objection is made and overruled, the fact that the objection was raised will serve the additional function of facilitating review on appeal, for a trial court then has the chance to make a record on the claim while the recollection of the parties (and, if necessary, any

[20] See, *e.g.*, *United States* v. *Granville*, 716 F.2d 819 (11th Cir. 1983); *United States* v. *Carter*, 720 F.2d 941, 950-951 (7th Cir. 1983); *United States* v. *Kennedy*, 714 F.2d 968, 976-977 (9th Cir. 1983); *United States* v. *Boykin*, 679 F.2d 1240, 1245 (8th Cir. 1982); *United States* v. *Fowler*, 605 F.2d 181, 184 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *United States* v. *Castenada*, 555 F.2d 605, 610 (7th Cir.), cert. denied, 434 U.S. 847 (1977); *United States* v. *Black*, 480 F.2d 504, 507 (6th Cir. 1973); *United States* v. *Indiviglio*, 352 F.2d at 280. But see *United States* v. *Robinson*, *supra*.

witnesses) is fresh. See *Gass* v. *United States*, 416 F.2d 767, 775 (D.C. Cir. 1969); *Indiviglio*, 352 F.2d at 280. As this Court has observed, "[a]ny procedural rule which encourages the result that [trial court] proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification." *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977).

As this Court's decision in *Socony-Vacuum* demonstrates, a strict construction of the plain error exception is particularly appropriate in considering allegedly improper summation arguments, both because argument errors are ordinarily easily correctible if brought to the attention of the trial judge at the time and because they are not well suited to review by appellate courts.

This Court has recognized, in circumstances far more serious than this, that curative instructions to the jury are sufficient to dispel the prejudice to the accused caused by improper prosecutorial comments in summation. *Donnelly* v. *DeChristoforo*, 416 U.S. at 644.[21] The courts of appeals have frequently

[21] In *Donnelly* the Court considered the prejudicial impact of an improper closing argument by a prosecutor, who asserted that the defendant hoped that the jury would find him guilty of something other than first degree murder (416 U.S. at 640). Because the prosecutor and the trial judge had cautioned the jury that the argument was not evidence, and because the trial court had given a cautionary instruction in response to the defendant's objection, this Court did not find the argument to justify reversal of the conviction on habeas review. The Court observed that "[a]lthough some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character" (*id.* at 644). If the argument in *Donnelly* was capable of being cured by a cautionary instruction, then the less prejudicial remarks in question here should certainly be considered susceptible to correction.

reached the same conclusion. *E.g.*, *United States* v. *Maccini*, 721 F.2d at 847; *United States* v. *Ward*, 481 F.2d 185, 187 (5th Cir. 1973); *United States* v. *Black*, 480 F.2d 504, 506-507 (6th Cir. 1973); *United States* v. *Webb*, 463 F.2d 1324, 1328 (5th Cir.), cert. denied, 409 U.S. 986 (1972); *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972); *United States* v. *Elmore*, 423 F.2d 775, 780-781 (4th Cir.), cert. denied, 400 U.S. 825 (1970); *Harris* v. *United States*, 402 F.2d 656 (D.C. 1968) (Burger, J.).

The difficulty of appellate review of an unchallenged closing argument stems from the fact that its impact on the jury—and hence its possible prejudice to a defendant—depends to a large extent on factors such as counsel's tone, gestures, emphasis, and facial expression, all matters not perceptible on a cold record to an appellate court. Trial court and counsel are in a far superior position to assess whether any prejudice has flowed from an argument. But where defense counsel makes no claim at trial of any error in the prosecutor's arguments, and the trial court sees none either, the risk is unduly great that an appellate finding of error will be based on a misreading of events that were innocuous at the time.

The analogy to improper jury instructions is instructive here. The Court has observed that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). Accordingly, if specific objection is not made at trial, a defendant may not generally raise the issue of inadequate jury instructions on appeal.

What this Court has concluded with respect to an unchallenged jury instruction applies a fortiori to an unchallenged closing argument. Not only is an improper argument as easily correctible at trial by means of a cautionary instruction (see *Donnelly* v. *DeChristoforo*, 416 U.S. at 644), but it is less susceptible to accurate review on an appellate record and far less likely to be prejudicial to a defendant. "Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence," do not reach the proportions of a miscarriage of justice. See *id.* at 646; *United States* v. *Foster*, 711 F.2d 871, 883 (9th Cir. 1983).

These principles were plainly violated here. Respondent neither objected when the prosecutor made the now-challenged remarks nor requested a curative instruction afterward.[22] But even though respondent neglected to raise any objection to the prosecutor's summation at trial, the court of appeals reached the merits of his claim. The court accorded little respect to the contemporaneous objection rule. Instead, purporting to rely on the plain error exception of Fed. R. Crim. P. 52(b), the court applied its own per se rule concerning the content of a prosecutor's closing argument. In so doing, the court stretched the plain error exception beyond all reasonable bounds.

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[22] Even though tactical considerations might make defense counsel reluctant to interrupt his opponent's summation or rebuttal, he should surely have requested a curative instruction had he perceived any unfairness or prejudice to his client. See *United States* v. *Carter*, 720 F.2d 941, 950 n.7 (7th Cir. 1983). Defense counsel may also, where necessary, request a bench conference out of the hearing of the jury. See *United States* v. *LaCoste*, 721 F.2d 984, 988 (5th Cir. 1983), petition for cert. pending, No. 83-6391 (the argument that a defendant's failure to raise an objection at trial was "a strategic decision to avoid drawing attention to" the impropriety "should rarely be an exception to the [contemporaneous objection] rule because an attorney can always ask for a bench conference if he wishes to object without drawing attention to a matter.").

To begin with, the court of appeals made no inquiry regarding whether respondent's "substantial rights" were prejudiced, as the Rule requires. It instead concluded that the comment constituted "plain error" simply because the subject of improper prosecutorial comments had been addressed frequently and in strong language by that court on previous occasions (Pet. App. 10a):

> Considering the position of this Court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error. Thus, the failure of Mr. Young's counsel to enter an objection at the time they were made is not fatal to this appeal.

But that position is contradictory to this Court's recognition that a plain error determination cannot be made solely on the basis of the nature of the error involved—that "each case necessarily turns on its own facts." *Socony-Vacuum*, 310 U.S. at 240. Moreover, it creates the possibility—a very real possibility in this case—that a conviction will be overturned on the basis of an abstract error that could not reasonably be thought to have affected the verdict.

Indeed, the court of appeals made no finding whatsoever that, in the context of this trial, respondent was prejudiced by the prosecutor's remarks.[22] In fact, such a finding would have been extremely difficult here, even apart from the wealth of evidence

[22] Even apart from the lack of a contemporaneous objection, an improper prosecutorial argument is not grounds for reversal unless there is substantial prejudice as well as impropriety. *E.g.*, *Maccini*, 721 F.2d at 846; *Angel* v. *Overberg*, 682 F.2d 605, 607-608 (6th Cir. 1982); *United States* v. *Kim*, 595 F.2d 755, 768 (D.C. Cir. 1979). Where there was no timely objection, the responsibility of appellate courts to focus only on substantial prejudice is all the greater.

showing respondent's guilt. After all, the trial court had cautioned the jury at the beginning of the trial that arguments of counsel were not evidence (Tr. 21), and, as we have shown, the jury almost certainly understood the comments as no more than a response to defense counsel's attacks on the prosecutor's personal sincerity and integrity. Most significantly, neither defense counsel nor the trial court saw anything obviously prejudicial in the prosecutor's statements at the time they were made. That casts considerable doubt on the notion that the statements could possibly have been so egregious that they led to a "miscarriage of justice" (*Frady*, 456 U.S. at 163). See *United States* v. *Trutenko*, 490 F.2d 678, 680 (7th Cir. 1973).

Nor did the court of appeals explain how the prosecutor's comments—which would be treated as legitimate "invited response" in most of the other circuits—could "seriously affect the fairness, integrity or public reputation of judicial proceedings" (*Socony-Vacuum*, 310 U.S. at 239). If error at all, the remarks were exceedingly close to the line. Consequently, respondent's failure to object at trial to the prosecutor's argument should have precluded respondent's claim on appeal. *United States* v. *Perry*, 643 F.2d at 51; *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972); *Apgar* v. *United States*, 440 F.2d 733, 737 (8th Cir. 1971); *United States* v. *Kravitz*, 281 F.2d 581, 587 (3d Cir. 1960), cert. denied, 364 U.S. 941 (1961). Appellate consideration of a trial court error such as this, which is not obviously prejudicial and which the defense did not mention at trial, has been condemned by this Court as "extravagant protection." *Henderson* v. *Kibbe*, 431 U.S. at 154 n.12; *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

In addition to protecting a defendant from error that was most unlikely to have prejudiced his rights, the court of appeals' disregard for the contemporaneous objection rule also denigrated the role of the trial court by depriving it of any opportunity to correct the error. "A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States*, 425 U.S. 80, 86 (1976); see also *Quercia* v. *United States*, 289 U.S. 466, 469 (1933) ("[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."). Where an error—if pointed out by defense counsel at the time—could easily be rectified by the trial court, it is especially inappropriate to permit the defendant to remain silent at trial only to raise the issue on appeal.

Had respondent's attorney lodged an objection at trial, the district judge would have been able to give a cautionary instruction to the jury, thereby curing any error that might otherwise have occurred. *Donnelly* v. *DeChristoforo*, 416 U.S. at 644. Because defense counsel did not object, however, the trial court was deprived of an opportunity to correct the "error" about which respondent now complains. Such a tactic is not to be encouraged. As this Court has noted: "Orderly procedure requires that the respective adversaries' views * * * be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). As one judge has observed:

> [C]ounsel have a duty to the court, an obligation at least to permit the judge to conduct a trial that finally determines the question at issue. A defendant may not remain silent in response to error and take his chances with the verdict before moving for a mistrial. Nor may he permit error to go unchallenged, then ask the appellate court to reverse the conviction.

United States v. *West*, 680 F.2d 652, 658 (9th Cir. 1982) (Wright, J., concurring). That obligation was ignored by respondent's counsel here. And since respondent cannot demonstrate that the belatedly noticed error resulted in a "miscarriage of justice" (*Frady*, 456 U.S. at 163), respondent should not benefit from his attorney's failure to accord the trial court a chance to remedy the error—if any—that arose from the prosecutor's remarks.

III. THE COURT BELOW ALSO ERRED IN FAILING TO ASSESS WHETHER THE REMARKS CONSTITUTED HARMLESS ERROR

Even had there been a timely but unavailing objection, the decision below nonetheless could not stand. The court of appeals reversed respondent's conviction without considering whether, in the context of the total record, any error in the challenged argument should be deemed to be harmless. In *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), this Court made clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations" (slip op. 9; see also *id.* at 10 n.7). *Hasting* clarified and reaffirmed a principle of long standing. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18, 21-22

(1967). The Court in *Hasting* held that the requirement of appellate "consideration of the entire record prior to reversing a conviction" applies to all "errors that may be harmless" (slip op. 10 n.7), a category that undoubtedly includes improper summation arguments by the prosecutor, as *Hasting* itself bears out.[24] See also, *e.g.*, *Socony-Vacuum*, 310 U.S. at 242; *United States* v. *Foster*, 711 F.2d at 883; *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981). The decision below thus is in clear violation of the requirement that any adjudication of error be accompanied by a harmless error analysis. See also 28 U.S.C. 2111; Fed. R. Crim. P. 52(b).[25]

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[24] *Hasting* concerned a prosecutor's reference during summation to the defendant's failure to testify.

[25] *Hasting* also put to rest any claim that the court below might properly have acted in exercise of its supervisory powers within the Tenth Circuit. In *Hasting*, the Court held that a reviewing court may not ignore the harmless error rule by exercising its supervisory powers (slip op. 5-6). Indeed, in language equally apt here, the Court observed (*id.* at 7-8):

> The conclusion is inescapable that the Court of Appeals focused exclusively on its concern that the prosecutors within its jurisdiction were indifferent to the frequent admonitions of the court. The court appears to have decided to deter future similar comments by the drastic step of reversal of these convictions. But the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.

That same kind of chastisement appears to be what the court below had in mind when it said (Pet. App. 11a) that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." The court of appeals apparently chose to punish the conduct of the prosecutor here

In our view, in cases where, as here, the defendant failed to preserve the claim of error for appeal by appropriate contemporaneous objection, the "harmless error" inquiry is properly subsumed within the "plain error" inquiry. For an error cannot affect substantial rights, let alone give rise to a serious risk of miscarriage of justice, unless there is a reasonable prospect, viewing the error in the setting of the entire trial, that it materially affected the verdict. Nevertheless, we take this opportunity to demonstrate that, even had the issue been preserved by timely objection, it could not have been materially prejudicial to respondent. Consequently, had the court of appeals followed the requirement of *Hasting* that it determine that an error is prejudicial before reversing a conviction, it could not have reached the result it did.

A number of factors support the conclusion that the prosecutor's comments did not substantially prejudice appellant's rights in the circumstances of this case. First, the trial court cautioned the jury at the outset of trial that the lawyer's arguments were not evidence. Second, the jury was undoubtedly aware that the prosecutor was an advocate and thus likely discounted much of his argument as the viewpoint of a party to the litigation. See *Donnelly* v. *DeChristoforo*, 416 U.S. at 640 n.7. Third, in the context of the defense provocation, the jury was unlikely to have understood the prosecutor's comments as anything other than a defense of his own integrity—not an intimation of evidence outside the record or an at-

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in order to vindicate its own unique closing argument rules; the court made no effort whatsoever to analyze the prejudicial effect vel non of the prosecutor's comments.

tempt to exploit the prestige of the government. See pages 25-26, *supra*.

Finally, and most importantly, the evidence against respondent was overwhelming. Not a single witness supported his defense that fuel oil mixed with condensate is equivalent to crude oil, and several witnesses expressly disavowed that position. It was beyond question that respondent failed to advise Apco of what he actually was supplying and that the oil he supplied did not meet the requirements of his contract. Moreover, the evidence conclusively showed that respondent acted affirmatively to conceal his scheme: he used an intermediary to recertify the fuel oil as crude oil, furnished a quantity of condensate each month to raise the gravity level of the oil he supplied to Apco, and concededly lied in response to inquiries from both Apco and government investigators. Under those circumstances, there was clear evidence of respondent's guilt. Cf. *Socony-Vacuum*, 310 U.S. at 239-240.

Not only was there strong evidence of respondent's guilt, but the error of the prosecutor's remarks was at most exceedingly marginal. As we have pointed out, the comments with which the court of appeals found fault were in fact prompted by defense counsel's own argument. Even if we are wrong in the view that the argument was fair response, it is scarcely possible that the prosecutor's remarks could have materially influenced the verdicts against respondent. The prosecutor's statement concerning his belief that a fraud had been committed were nothing more than a statement of the obvious. And his statement that Apco might well have to make restitution under the entitlements program was supported by the evidence (see Tr. 440). Finally, the prosecutor's ambiguous statements urging the jury not to acquit on a basis contrary to the trial court's instructions, and contradicting defense counsel's claims that respondent alone had acted with honor, appear an entirely proper response to what amounted to a defense plea for jury nullification. This statement could not have prejudiced any legitimate defense by respondent. In view of the strength of the government's case and the fact that the prosecutor's remarks were in direct response to defense counsel's arguments, it is virtually impossible that the prosecutor's rebuttal argument could have contributed in any significant respect to the jury's verdict. See *Hasting*, slip op. 11-13.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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